No 47 of 1939

IN THE HIGH COURT OF A

ORIGINAL

Griffiths and others

V.

Steel and others

REASONS FOR JUDGMENT.

Judgment delivered at Melbourne

on Monday, 11th March, 1940

H. J. Green, Govt. Print., Melb.

C.2774

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GRIFFITHS V. STEEL AND ANOR.

Order.

Appeal dismissed with costs.

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GRIFFITHS AND OTHERS V. STEEL AND OTHERS.

JUDGMENT. MR JUSTICE RICH.

GRIFFITH AND OTHERS V. STEEL AND OTHERS.

Judgment. Rich J.

In this suit each of the plaintiffs claimed to be entitled to a fourth share with the defendant E.A.V.Steel in the first prize money in the State Lottery which was drawn on the 14th November 1938. The suit was heard by Nicholas J.who decided against the plaintiffs' claim and dismissed the suit. Hence this appeal. The dispute between the parties is as to the ownership of the ticket which gained the prize. The application form for this ticket was in the name of E.G.Steel (one of the defendants) and its syndicate name was "Sodelia". The defendant E.G. Steel at the same time applied for another ticket in the same lottery for which the syndicate name "Going Away" was given. The ticket in respect of this syndicate name was last seen on 14th November on the bar of the Chelmsford Hotel at Kurri Kurri of which the defendant E.A.V.Steel was the licensee.

The learned primary judge examined the incidents in connection with the dispute and analysed the evidence. I do not propose to recapitulate the evidence. It was carefully dissected by counsel and I have

had further opportunities of re-reading and considering it. The two main incidents are those which occurred on the 7th and 14th Novr. The evidence of the defendants Steel and of the witnesses Treay and Sneddon who were in the bar at the time, as to the incident of the 7th was that the defendant E.A.V.Steel had backed a horse called Sodelbia, which was running on that day in the Geelong races. The result that the horse had won the race and the starting price were heard on the wireless at the hotel. The price was 7 to 4 on. The defendant E.G.Steel told his father the price, the latter on hearing the short price took some coins out of his pocket and told his son "we will get the balance out of the lottery". His son said "What will we call it Dad" and his father answered "We will call it after "the horse, 'the Sodelbia Syndicate'". Sneddon a bank accountant - an independent witness - was called by the plaintiffs in connection with the defendants' bank account and in cross examination he substantiated the evidence given by the defendants as to this conversation. Plaintiffs' counsel did not attempt to cross examine Sneddon on this evidence. The primary judge in dealing with this incident said he would hesitate to believe

that it took place if he had only the evidence of the defendants to go upon. His Honour said "the incident is of the first importance in the case"....."I see no reason to disbelieve Sneddon". The other main incident - that upon which the plaintiffs' case rests - took place at the end of a card party on the morning of 10th November. The party consisted of the plaintiffs and the defendant E.A.V.Steel. It was suggested that they should purchase a lottery ticket. Thesuggestion was agreed upon. One name suggested was "Three o'clock" - the hour when the party came to an end. And the plaintiffs say that the defendant E.A.V.Steel suggested Sodelbia as the name. He denied this although he admits that the party was held and that it was arranged to send for a ticket. The plaintiffs did not contend before the primary judge that they and the defendant E.A.V. Steel chose or agreed upon Sodelbia as the name for their ticket or that before the drawing of the lottery in question the ticket which bore that name was appropriated to them but they contended that as "Sodelbia" was one of the names mentioned by them it was a just inference from all the evidence that the Sodelbia ticket belonged to the syndicate. On the 12th Novr.the tickets applied for by the defendant E.G.Steel arrived and were

placed in a till appropriated to lottery tickets and other documents. The plaintiff ~~xxyx~~ Griffiths says that he was told by the defendant E.A.V. Steel that the ticket that the plaintiffs were interested in had arrived but Steel denies that he told Griffiths anything. On 13th Novr. the defendant E.A.V.Steel went away for a holiday. He heard the result of the drawing on the 14th at Taree and telegraphed to his son and told him to open the bar which he had already done. E.A.V.Steel did not return until 23rd Novr. The news of the win was well known in Kurri Kurri on the 14th. But until his return none of the plaintiffs had explicitly claimed from either of the defendants Steel a share of the prize money. The plaintiff Griffiths had complained in the bar of the Chelmsford Hotel that although he had taken a ticket in the lottery he was excluded. When E.A.V.Steel was asked by the plaintiffs to show them their ticket he took a ticket out of the till and said it had been in the till ever since it had come from the lottery office on Saturday morning. On the front of it was written Wedding Syndicate. This ticket belonged to Mrs Avery at whose instance E.G.Steel had applied for it. The plaintiffs believed that if E.A.V.

Steel did not refer to the Wedding Syndicate he left the impression in the minds of the three plaintiffsthat that was the ticket which he had in mind. He did not mention that the name of the second ticket was Going Away. It may be true that the Going Away ticket was lost and so he showed the plaintiffs the Wedding Syndicate ticket to dispel their doubts or that it was a mistake on the part of E.A.V.Steel. Reviewing the facts "the question," said the learned primary judge,"then is whether the ticket applied for on the 10th was applied for in pursuance of the direction then given i.e.by the defendant E.A.V.Steel to his son E.G.Steel on the 7th,or in accordance with the resolution reached on the morning of the 10th. There is no suggestion that E.A.V.Steel at the party on the 9th or afterwards on the 10th pledged himself to use the name "Sodelbia" for the plaintiffs, or that before the 14th "Sodelbia" was appropriated to them". And the learned judge relying mainly on the evidence of the independent witness Sneddon as to the incident of the 7th Novr. considered that the winning ticket was applied for in pursuance of that direction and that the plaintiffs had not proved their case and could not succeed. It was contended before us that the primary judge had placed the onus of proof on the plaintiffs in-

stead of on the defendants. Up to a stage in the case the onus must have been upon the plaintiffs in making out essential parts of their title to the ticket. They had to show that a syndicate had been formed, that they were members, that they paid their money and that the defendants or one of them was commissioned to get the ticket. Only then does any question of the shifting of the onus or the place where the onus of identification lies come into the case. I am not prepared to regard Nicholas J. as having left these considerations out of account. There was evidence that the defendant E.A.V.Steel through his son E.G.Steel bought three tickets including the winning ticket. The exact nature of the relationship and duties of an agent depend upon the facts of the particular case. In the instant case the facts stated shortly are that the defendant E.A.V.Steel arranged with the plaintiffs and others to get a ticket in a lottery for them and himself. No name was agreed upon as the distinguishing mark of the ticket. E.A.V.Steel directed his son E.G.Steel to apply for this ticket and also for a ticket for himself and that son. E.A.V.Steel as agent, fiduciary or otherwise fulfilled his obligation if at the relevant time he had enough tickets to distribute and was in a position before the drawing to identify the ticket in which the plaintiffs were interested by some distinguishing mark which he had affixed or otherwise. The plaintiffs do not contend that the name "Sodelbia" was agreed upon. The onus is upon them to show that that name was agreed upon with E.A.V.Steel beforehand or was so agreed afterwards. It is true that after the event E.A.V. Steel admitted that he had made a mistake in showing the plaintiffs a different ticket. This mistake may affect

Steel's credibility but would not affect other evidence e.g. that of Sneddon and Treay to the effe ct that Sodelbia was identified with the syndicateof E.A.V.Steel and his son E.G.Steel. Assuming some onus to rest upon the defendant E.A.V.Steel of identifying the ticket allotted to the plaintiffs nevertheless it is not true that the plaintiffs by paying their quota and saying "I leave it to you"/obtain a real interest in all tickets E.A.V. Steel may buy in the particular event and thus can pick and choose after the event. Evidence having been given on behalf of the defendants onus is of little consequence in the first instance except perhaps in the absence of any findings of the Court. Where the plaintiffs and defendant failed to fix on the name beforehand or to fix on the ticket when it came to hand,it may be that it was not only the defendant's duty to have a ticket in which the plaintiffs could have an interest but before the drawing of the lottery to distinguish it from other tickets in his possession. The case resolves itself into one of fact with perhaps a slight onus on the defendants if the judge makes no findings and is not clear as to the result. What would be the result if five customers on different occasions required tickets in the same lottery in the name of John Jones,Post Office,

Waverley. Should the agent refuse to act for four of them, or, if he does is he liable to each if each of them fails to discharge an onus? He would interplead, of course, and each would bear his onus. In the circumstances it was for the plaintiffs to prove that the winning ticket was the one which the defendant E.A.V.Steel had purchased in accordance with his undertaking. The evidence in the case was contradictory except as to the findings of the primary judge as to the first incident that of the 7th Novr. which is the keystone of His Honour's decision. Some of the evidence suggesting that the winning ticket was the ticket that the defendant E.A.V.Steel had appropriated to the plaintiffs and himself; other of it suggesting that it was the ticket that he had appropriated to himself and his son exclusively. What was the proper inference to draw from this conflicting testimony depended upon the trial judge's view of the relative credibility of witnesses whom he had seen and heard. In such a case it would not be proper for a Court of Appeal to substitute its views for his unless there was something in the case which not merely inclined the Court to the opinion that the trial judge may have been wrong but was sufficient

to enable the Court to be completely satisfied that he was plainly wrong: Powell's case, 1935 A.C.243. In the present case, especially in view of the definite finding of the learned judge to which I have referred, there is nothing in my opinion to justify us who have not seen or heard the witnesses to substitute our view of their relative credibility.

The appeal should be dismissed.

GRIFFITHS AND OTHERS V STEEL AND OTHERS.

JUDGMENT. STARKE J.

This was a suit in the Supreme Court of New South Wales in its equitable jurisdiction in which the plaintiffs, the appellants here, prayed that it might be declared that they were entitled to a one fourth share in the first prize of £5000 won in State Lottery No.545 Ticket No.85,050.

The case for the appellants was that the winning ticket was purchased by the respondent E.A.V.Steel or by the respondent E.G.Steel on his behalf pursuant to an agreement under which the appellants and the respondent E.A.V.Steel were each to contribute 1/6 in order that a lottery ticket might be applied for on their behalf. It is not denied that a lottery ticket was applied for and obtained pursuant to this agreement. But another lottery ticket in the same lottery was also applied for and obtained by or for the respondent E.A.V.Steel at the same time. The applications were in the name of the respondent E.G.Steel under the syndicate names "Sodelbia" and"Going Away". The "Sodelbia" ticket won the first prize in the lottery and the appellants allege that it was this ticket that was purchased on account of themselves and the respondent E.A.V.Steel.

The onus of establishing the allegation was in the beginning and always upon the appellants though slight evidence might be sufficient to discharge that burden in a case in which the facts lay peculiarly within the knowledge of the respondents. It was also suggested that the respondents E.A.V.Steel and his son E.G.Steel were in a fiduciary position as regards the appellants and that the burden was upon them to distinguish the lottery ticket belonging to E.A.V.Steel from that in which the appellants were interested. Cook v Addison L.R. 7 Eq. at p.470. But this is not a case in which trust property has been mixed with property belonging to the fiduciary. It is merely a question of identity: which was the ticket in which the appellants had an interest and which belonged to the

respondent E.A.V.Steel.

The acts of the respondents and the evidence certainly give rise to suspicion, but Nicholas J. who heard the evidence and saw the witnesses was not satisfied that the appellants had proved their case. The facts are fully discussed in his reasons for judgment and it is plain that the learned judge was in a much better position to reach a proper conclusion than is any member of this Court. It is not enough to entertain doubts whether the decision below is right: the Court should be convinced that it was wrong. Powell and anor. v Streatham etc. Home 1935 A.C. at pp.265-6. And I have not been convinced that the decision of the learned judge was wrong.

This appeal should be dismissed.

G R I F F I T H S and Others

v.

S T E E L and Another

JUDGMENT

D I X O N J.

G R I F F I T H S and others v. S T E E L and another.

The decree under appeal dismissed without costs a suit brought by the three appellants as plaintiffs to establish that they are beneficially entitled, together with the defendant Ernest Albert Victor Steel, in equal one fourth shares to a winning ticket in the N.S.W. Lottery obtained by and in the name of the defendant Ernest Gardner Steel. The lottery was drawn on Monday 14th November 1938 and the prize won by the ticket was £5,000 . The ground upon which the suit was dismissed by Nicholas C.J. in Eq., before whom it was heard, was that on the whole he had come to the conclusion that the plaintiffs had not proved their case. It was not denied that the

three plaintiffs and the defendant E.A.V.Steel had contributed in equal shares for the purchase of a ticket in the same lottery and that a ticket had been purchased for the syndicate so formed by and in the name of the defendant E.G.Steel, a son of the first defendant; but it was denied by the Steels that the winning ticket was the ticket purchased for the syndicate. They claim that the winning ticket was a ticket purchased for their own benefit at the expense of the father. On the issue thus arising Nicholas C.J. in Eq. placed the burden of proof on the plaintiffs and, on the whole of the evidence, considered that the burden had not been discharged. The decision of the appeal depends in a large measure upon the correctness of the view that the identity of the ticket which the defendants or one

of them had purchased for or appropriated to the syndicate of which the plaintiffs were members, was a matter of proof of which rested upon them and not upon the defendants. The importance to be attached to the onus of proof is not difficult to understand. The amount at stake is considerable. The transaction took place in the bar room of an hotel, which the defendant E.A.V.Steel conducted and where his son served as barman. Few of the witnesses seemed to have had claims to any very high degree of personal credibility. Witnesses whose word alone is enough to carry conviction are seldom found among the class who cluster round bar rooms and centre their interests on the achievements of dogs and horses and on starting price betting.

It had been left to the defendants to obtain and hold the ticket on behalf of the syndicate and the signifance of the names adopted by them to distinguish one ticket from another was a matter within their knowledge and not that of the plaintiffs. Further, little or no reliance was placed by the learned judge on the evidence of either of the defendants or of another son called on their behalf and much of it was actually disbelieved. The case made by the plaintiffs upon the identity of the ticket was necessarily confined to circumstantial evidence. But unexplained it raised, as it appears to me, a strong presumptive inference that the winning ticket was that obtained for or allocated to the syndicate. Their story was this. On Wednesday evening 9th

November 1938 after attending some dog races the three plaintiffs found the defendant E.A.V.Steel standing outside his hotel. All four of them went to the dwelling of the plaintiff Griffiths which adjoined the hotel and was connected with a butcher's shop managed by Griffiths. There they played cards until the early hours of the morning. Two or three days earlier, on Monday 7th. November to be exact, a horse named Sodelbia which they had all backed at starting price had won a race, but at odds on, and this appears to have been among the topics over which their talk wandered. After the game, they went next door to Steel's bar for drinks and their the plaintiff Fren suggested that they should put in eighteen pence each and buy a lottery ticket. This

was agreed by all though Griffiths, at first made some objection. Fren asked what the syndicate should be called and suggested "Three o'clock", that being the hour. Steel said " Why not Sodelbia ?" The question of name was not pursued but the money was entrusted to Griffiths and the party broke up. During Thursday Griffiths went into the bar and finding E.A.V.Steel there, asked him to get the lottery ticket and handed him six shillings. The closing day of the lottery was drawing near and Steel said that he would get the ticket at once. To obtain a ticket it was necessary that he should fill in an application form, and send it together with a postal note to the Lottery Office in Sydney. The form of application provided a space for a "syndicate name", but neither

Griffiths nor Steel referred again to the name to be used. On Saturday, 12th November, Griffiths happened to see Steel at the hotel and the latter remarked that the lottery ticket had come back. They knew that Steel intended to leave next day, Sunday 13th Nov., by car for a holiday and this he in fact did. On Monday the lottery was drawn. The news that the first prize had fallen to a ticket held by the Steels was learned by the three plaintiffs by different means. Griffiths learnt it from E.G.Steel who came into his butchers shop and said - " Jack we have struck the lottery, but it is in my name though :, it is Dad and I." Griffiths says that in response he said, " Ern, we have a ticket with your father in that lottery and I would like to see it. " E.G.Steel answe

that he knew of no ticket belonging to them.

Fren, a taxi driver, heard the news from another taxi driver who told him that young Steel had struck the first prize in the lottery.

Groves, a barman in another hotel, heard it from E.G.Steel himself who came into the bar where Groves was at work and announced that he had won the lottery and ordered drinks for all present.

Some time later each of them learned from one source or another the further news that the syndicate name of the winning ticket was Sodelbia. Griffiths was told on the same day by an acquaintance of the parties named Johnson who was a news-

- paper reporter, Fren

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Griffiths was told on the same day by an acquaintance of the parties named Johnson who was a newspaper reporter, Fren

heard it within an hour in a billiard saloon, and Groves read of it next day in the newspapers. The story that appeared in the local press was, it seems, that the defendant E.G.Steel held the winning ticket on account of himself and his father, who constituted a syndicate called Sodelbia after the racehorse of that name, which they had successfully backed : that when they had learned to their disappointment that the horse had started at odds on the father had said " Never mind. We shall get the rest from the lottery," and accordingly Sodelbia had been adopted as the name of the syndicate formed by the father and son. This the plaintiffs read that evening or next morning. Fren says that he spoke to Griffiths about the use of the name and said that it was peculiar

it should be that mentioned on Thursday morning in the hotel, that is after the game of cards when each of them contributed his eighteen pence for a ticket. Next day Griffiths went down to the hotel but saw only William, E.A.V.Steel's other son. The plaintiffs waited for the return of E.A.V.Steel. He came back on 23rd. November. On 25th. November he saw Griffiths, who says that he asked him where the ticket was that he had bought on their behalf. At first Steel replied by asking whether it was not in the previous lottery. He then asked what the syndicate was called, to which Griffiths answered that he, Steel, should know becuase he, not Griffiths, had named it and sent for the ticket. Steel then said he would look for the ticket. Next day, Saturday

26th. November, Griffiths again asked to see the ticket saying he had been told that it was in the till; Steel while agreeing that it was in the till did not produce it. Fren next takes up the story for the plaintiffs and says that on Tuesday 29th. November he went down to see Steel and demanded to see the ticket obtained for the plaintiffs and Steel. The latter said that it had been in the till since it arrived on the Saturday before the lattery was drawn. He produced a ticket in the same lottery but bearing a comparatively low number and inscribed " Wedding Syndicate". Turning it over Steel showed him it was endorsed " Fren Groves and Griffo" and told him he had written the names on the back of the ticket on the morning of

its arrival to avoid mistake and confusion with any other tickets in the till. Fren then asked for pencil and paper and copied the name of the syndicate and the number of the ticket. Steel retained the ticket. Fren told Groves and Griffiths what had occured and their suspicions were aroused by the number borne by the ticket which appeared too low for a ticket issued as late as the day before the lottery was closed. Griffiths, on Saturday 3rd. December, went to the hotel and asked Steel to show him their ticket. Steel produced the same ticket and Griffiths saw the number and name "Wedding Syndicate" and the plaintiffs' names endorsed upon the back. Steel repeated that he had written them when he got the ticket in order to avoid confusion . On Tuesday

6th. December Fren and Groves journeyed to Sydney where they were enabled to learn from an officer of the Lottery Office what tickets the Steels had applied for and to whom the ticket produced to them had actually been issued. They found that E.G.Steel had made two applications, both dated 10th. November and dealt with on 11th. November: one for a syndicate called "Going Away" and the other for the syndicate called "Sodelbia" . They discovered that the ticket produced by Steel to them bearing the words "Wedding Syndicate" had been issued at an earlier date to a Mrs. Avery who kept an hotel at North Richmond and who had applied for it giving thatvsyndicate name. They at once motored out to see Mrs Avery and learned from her , as the fact was, that after she

had read in the newspapers that Steel, Whom she did not know, had won the lottery, fancying she discerned in what she had read some coincidences with experiences of her own, she had written to him suggesting that they should join in purchasing a lottery ticket and, in support of her narrative, she had enclosed her own unsuccessful ticket inscribed "Wedding Syndicate".

Armed with this knowledge of the falsity of the statement that the ticket produced by Steel was their's, the plaintiffs consulted a solicitor and, under his advice, acted on the following day went together to Steel with a view of getting him to repeat his assertion that the Wedding Syndicate ticket was their's. They state that on this occasion he did not produce the ticket, saying he

had lost it, but he told them that he and not his son had applied for the ticket and the name Wedding Syndicate had been given to the ticket because of the recent marriage of his son Ernie. His wedding had in fact taken place five weeks before the application. Finally Steel offered, if they doubted his word, to take them to the Lottery Office, an offer they did not accept.

On 23rd December 1938 the plaintiffs' solicitor wrote letters to each of the defendants Steel claiming on behalf of the plaintiffs their shares in the prize money and stating that they had evidence that the Wedding Syndicate ticket which E.A.V.Steel had produced as theirs was not applied for by him or on his behalf and was not in his possession until after the drawing of

the lottery.

The defendants' solicitors peplied on their behalf on 3rd January 1939 denying the plaintiffs' claim. Their letter on behalf of E.A.V.Steel said - " He has instructed us to state that in error he did show them a ticket believing it was the ticket in which your clients were interested but actually the ticket they they were interested in was No. 93430 in Lottery No. 545 (i.e. that in question drawn on 14th November) and that it was in the name of the "Going Away" syndicate." Up till that time the defendants had never mentioned " Going Away" as the name of the plaintiffs' syndicate and had never mentioned the ticket so named; the plaintiffs knew of its existence only from the officer of the

Lottery Office. The foregoing represents the effect of the story told by the plaintiffs.

To meet the adverse inference to be drawn from it, the defendants relied partly upon an explanation of the chief circumstances supporting the inference and partly upon denials of some of the statements ascribed to one or other of them which tended against the truth of that explanation. The story told by the defendants began with the receipt of the news that the horse Sodelbia in the race it won had started at odds on. They said that upon hearing this intelligence E.A.VSSteel in the presence of witnesses turned to E.G.Steel and exclaimed " What a price. Here Son, send for a lottery ticket, call it Sodelbia and we

" will get the balance out of the lottery," or something to the same effect, at the same time throwing down six shillings. That was on Monday 7th. November. E.G.Steel says that then and there he filled in an application for a lottery ticket giving Sodelbia as the syndicate name, but he found no opportunity of going to the post office. It was therefore not sent. E.A.V.Steel said that before the cards on November 9th., that he had given his son the money to send for a lottery ticket and told him to call it Sodelbia. Inferentially he denied that he suggested Sodelbia for the syndicate formed in the early hours of the morning after the cards. He says that Griffiths came with meat at about eight o'clock that morning, Thursday 10th. November, and put down the money for the

lottery ticket including his own contribution, which at the time he had withheld. He asked Steel to send for the lottery ticket saying that he himself was too busy that morning. He left the bar and E.G.Steel turned to his father and asked what it meant. His father said that he and the three plaintiffs were putting in for a ticket. E.G.Steel enquired what it was to be called, to which his father replied that he could call it what he liked. He suggested that as his father was going away three days later he would call it " Going Away syndicate" and his father expressed his assent. E.G.Steel continued the harrative. He said that he made out an application for a ticket for the "Going Away Syndicate' and while doing so noticed his application form for the Sodelbia

syndicate lying with the six shillings enclosed. Seeing that it bore the date 7th November , he made out a new application for the Sodelbia syndicate dated that day, i.e. 10th November. He then took them to the post office, purchased the necessary postal notes and put both applications in the post. On Saturday 12th November the two tickets arrived and E.G.Steel put them both in a drawer of the till where it was customary to place lottery tickets, among other papers. Next day his father left, in accordance with his plan, accompanied by a friend named Christensen.

On Monday 14th November Johnson, the newspaper reporter, brought the news that the ticket had won the first

prize. He asked for their tickets and E.G.Steel produced both the Sodelbia and the Going Away. He says that Johnson identified the Sodelbia as the winning ticket and left the Going Away on the counter, after which it was not again seen. It was not produced at the trial and this was the explanation the defendants gave of its non-production. E.G.Steel went on to describe what he did after learning the news. He agrees that he told Griffiths but he denies that the latter made any reference to the syndicate of which he was a member or enquired after their ticket. He says that he went next to the bar where Groves served and received Groves' congratulations. Later he received a telephone call from his father. Christensen gave

evidence that he heard E.A.V.Steel ask over the telephone which ticket had won and repeat the answer " We have got it on our own."

E.G.Steel says that while his father was away Mrs.Avery's letter arrived, that he opened it, complied with its request and sent her an answer. He placed her letter in the drawer but put the ticket that had come with it, the Wedding Syndicate ticket, upon the wine stand. By some means if found its way to the till where, according to E.A.V.Steel, he came upon it on the day following his return. He says that Fren on that day, viz.24th November, asked him the name of the ticket in which the plaintiffs were interested and where it was. He thereupon went to the till

and found the Wedding Syndicate there and no other. Concluding that it was the ticket for which Fren was enquiring he produced it to the latter, telling him that it must be the one and in his presence wrote the names of the plaintiffs on the back. Fren, of course, denies this. Steel agrees that Griffiths questioned him on 25th. Novemmber but says that it was then that he produced the ticket he had shown Fren and explained the name by reference to his son's marriage. He also says that Griffiths came a/ a second time to see the ticket, that he came on Tuesday 29th. November when possibly he, Steel, did point to the names and say "that is where I wrote your names." He admits that Fren did

obtain pencil and paper and copy the name and number of the ticket, but he says that was on an occasion when Fren for the second time asked to see the ticket, an occasion which was soon after Fren's first visit. The next visit of any of the plaintiffs was, he says, on 7th December when all three came and asked that the ticket should be shown to Groves who had not seen it. The ticket could not be found but he offered to take them to the Lottery Office and obtain replicas of the tickets . The defendants did not produce the Wedding Syndicate ticket at the hearing of the suit and they say that from the time of the 7th. December when they were unable to find it, it has not been seen. No explanation of its disappearance was given. E.A.V.Steel's case is that his

identification of the Wedding Syndicate ticket as that in which the plaintiffs were interested was due entirely to a mistaken inference drawn by him from the fact that it was the only ticket in the till and related to the same lottery, and that his mistaken belief continued until he told his sons that he had shown the ticket to the plaintiffs as their's and that only then did he learn the truth or see Mrs. Avery's letter . As might be expected the plaintiffs' counsel directed his cross examination to fixing the time when this occurred but the date or occasion is left in doubt. It is contended for the plaintiffs that it could not, on the evidence, to be taken to be later than 28th. November. However this may be E.A.V.Steel says that it was the

first time that he learned that Going Away was actually the name used for the ticket he shared with the plaintiffs, though his son had said on 10th. November that he would use that title, and it was the first time that he learned the source of the Wedding Syndicate ticket. It plainly appears that from the time of his return both E.A.V.Steel and his son were aware that the plaintiffs were dissatisfied and were inquiring into the identity of the winning ticket, that the question was the subject of much gossip and our rumour/and that in the locality public feeling was so deeply stirred that even the consumption of the defendants's beer began to suffer . But whatever discussions between father and sons may have taken place over these circumstances, E.A.V.Steel

maintains that his delusion as to the Wedding Syndicate ticket persisted.

As to some of the points where the respective stories of the parties are in conflict Nicholas C.J. in Eq. made specific findings. " As to what passed at the card party, I accept " His Honour says " the evidence of the plaintiffs that "the name 'Sodelbia' was mentioned by them but that no name " for the syndicate then formed was agreed upon. E.A.V.Steel " says that at the beginning of the party he told the plaintiffs " that he had given his son money to buy a ticket in the name " of 'Sodelbia' and that 'Sodelbia' was not mentioned (again)". There was some controversy as to His Honour's meaning in this passage. For the defendants, it was said that it is limited

to a rejection of Steel's version and an acceptance of so much only of the plaintiffs' account as makes the horse Sodelbia a general subject of conversation and a subject started by them and not the defendant. But the most material point of the plaintiffs' account was the suggestion thrown out by Steel that Sodelbia should be the name of the syndicate and His Honour's general statement must, I think, cover that evidence.

As to the question what Steel said when he produced the Wedding Syndicate ticket to Fren, Nicholas C.J. in Eq. says definitely that he believed Fren. He makes it clear that he believed that Steel said that he wrot-e the names, "Fren Groves " and Griffo," on the back of the ticket when it arrived on 12th.

November. He believed too that Steel showed the same ticket to Griffiths on 3rd. December and that Griffiths had asked to see the ticket some time before. The differences in the accounts given of the meeting between the three plaintiffs and E.A.V.Steel on 7th. December do not seem important, but His Honour believed that at all events Steel conveyed the impression that the Wedding Syndicate ticket was that which he had in mind. The testimony of the Steels proved anything but convincing. Nicholas C.J. in Eq. said that he found none of them a satisfactory witness and that the explanation of the unsatisfactory demeanour of the two defendants appeared to him to be that they were all endeavouring to tell a story which had been agreed upon but

imperfectly rehearsed. His Honour also expressed doubt upon the question whether E.A.V.Steel, when at the telephone on 14th. Nov., used the words to which Christensen deposed.

The findings which I have so far summarized lend much support to an inference in favour of the plaintiffs, a positive inference that the name Sodelbia was used to identify the syndicate composed of the plaintiffs and the defendant E.A.V.Steel or else that the ticket bearing that name was apprppriated to the syndicate. The probability that ~~xxxxxxxxx~~ the word Sodelbia would be used to identify a syndicate of four men who had backed the one horse, and that the words "Going Away" would be used to identify the syndicate composed of a man who was about to go away and his son, the

suggestion by Steel that Sodelbia should be used for the former syndicate, the failure of the defendants to produce the Going Away ticket or to refer to it and the endorsement of the Wedding Syndicate ticket with their names, its production as their's and the false statements made about it combine to produce a strong impression in favour of the conclusion that the Sodelbia ticket was the plaintiffs'. But two countervailing considerations caused the learned judge to refuse to give effect to such a conclusion. In the first place he found as a fact that on Monday 7th. November, the day of the win by the horse Sodelbia, E.A.V.Steel did, on learning the starting price, tell his son to

get a lottery ticket and call it Sodelbia. The reason for so finding consisted chiefly in the corroboration given by one of four persons said to have been present who was called as a witness and whose evidence appeared credible. Two other reasons, it is true, were given by His Honour , the validity of which were attacked, but even if the support of those reasons were withdrawn the finding should, I think, still stand.

In the second place His Honour was impressed by the view which he acknowledged wore the appearance of conjecture, that Steel's conduct might be explained by his anxiety to silence rumours which were abroad in the locality and which were affecting his trade, that he used the Wedding Syndicate ticket, the Going

Away ticket having been lost, and he wrote the plaintiffs' names on the back of the only ticket he had with a view to convincing them that it was theirs . Nicholas C.J.in Eq. did not believe the story of E.G.Steel that he made out an application form at the time, which he did not post. But His Honour appears to have regarded what he calls the" reactions" of E.G.Steel on hearing the result of the lottery as a factor tending in favour of the defendants rather than of the plaintiffs.

After stating the various considerations to which I have briefly referred the learned judge expressed his conclusion that on the whole the plaintiffs had not proved their case and could not succeed, language which clearly shows that his decision

rests on the burden of proof.

In my opinion once it was shown that the plaintiffs had together with the defendant E.A.V.Steel formed a syndicate for the purchase of a lottery ticket and had contributed the money, that Steel was to apply for the ticket and forward the money, that he delegated the task to his son and that his son had obtained a ticket capable of answering the description and that ticket had won the prize, then the burden fell upon the defendants of showing that some other ticket was that obtained for or appropriated in due time to the plaintiffs' syndicate and that the winning ticket belonged to the defendants. This burden was, I think, reinforced by the presumption against those who prepare

and put forward false documents and a false case. This presumption arose as soon as it was found that Steel had concocted the story that the Wedding Syndicate ticket was that in which the plaintiffs were interested and that he had written their names upon it before the lottery was drawn. The two presumptions in question are quite independent and are of different natures. The second is a principle of evidence or proof the operation of which is probative. The first is the result of the application of general equitable doctrine to the conditions stated. To apply for a lottery ticket is a small if not a trivial matter, but if the applicant applies in his own name although for the benefit of others he obtains the legal

title to the ticket and those for whom he is acting have nothing but an equitable interest in the ticket and, if it wins a prize, in the right to the prize money. As the person in whose name the ticket is purchased, the applicant obtaims its custody and, subject to his equitable duties, is enabled to exercise whatever xi rights a lottery ticket gives and to deal with the document as he thinks proper. The applicant to whom the ticket is issued is, in other words, a trustee. His fiduciary duties are few and are certainly not burdensome. They are those of an agent who undertakes to acquire property for his principal in his own name. It is a simple thing but it involves fiduciary duties. While it belongs to that category, nevertheless it is necessary to

remember the misconceptions which exist as to what follows from the mere fact that a given relation is fiduciary. In re Coomber 1911 1 Ch. 723 at p. 728 Fletcher Moulton L.J. stated with some emphasis the width and variety of the class. Speaking of an argument which, in the case then in hand, counsel had based upon the bare fact that a relationship existing between the parties was fiduciary, His Lordship said:- " This illustrates in a most " striking form the danger of trusting to verbal formulae. " Fiduciary relations are of many different types; they extend " from the relation of myself to an errand boy who is bound to " bring me back my change up to the most intimate and confidential " relations which can possible exist between one party and another " where one is wholly in the hands of the other because of his " infinite trust in him. "

But, though it is absurd to suppose that one fiduciary situation involves the same consequences as another, the duties of a specific relation are determined by the application of the principle. One of the duties of an agent acquiring any property whatever in his own name for his principal is that of distinguishing that piece of property from other similar things in which he may himself be interested. This duty applies with special force to a lottery ticket. For it is a piece of property possessing one very unusual set of characteristics. Before the lottery is drawn the ticket forms only one of a large series, every member of which has the same value and effect as every other. Except for the numbers inscribed upon them, lottery

tickets are indistinguishable and, in a logical point of view, one is as good as, of not the same as, another. Up to the drawing of the lottery the value of the tickets is small but uniform. But the drawing deprives most of them of all value and confers very great value on others. It is therefore essential that every ticket shall clearly be distinguished from every other ticket and that the identity of the ticket to which each person or group of persons is beneficially entitled shall clearly be ascertained at or before the time of the drawing. Where a ticket is obtained by an applicant in his own name for the benefit of others or for himself and others the mere fact that he has so applied for it will be enough to identify it

unless he applies for another ticket. But as soon as he does the necessity arises of adopting some further means of distinguishing between the two tickets. It is incumbent on every fiduciary to avoid confusing his own property with that held in his fiduciary capacity as the specific property of others. The well settled rule is that when a confusion has nevertheless occurred, it lies upon him to show what is his property. The rule placing upon him the burden of proof is not technical or limited in its application and should, I think, govern every case where both the duty and the means of distinguishing what is the trustee's or agent's property from what is the beneficiary's lies with the former. Where a second lottery ticket is acquired for himself at

the same time as he applies for one in his own name for the benefit of others, it seems only reasonable that the applicant should be placed under the burden of showing which of them he appropriated to himself. If the means of identifying that of his principal's was prescribed or indicated by the arrangement in pursuance of which he applied for the ticket, it will of course be enough to show that he followed the course indicated. But if he is left to adopt his own course it will hardly suffice if he shows that he marked or named the rival tickets with marks or names which only to those who knew their meaning would establish the ownership of the tickets without also satisfying the Court of the meaning they bear. To place the burden upon the

beneficiaries is to leave them with a task alike undefined and impracticable. What is the ultimate fact they are to prove ? The intent of the applicant when he applied for or when he received the ticket ? What constitutes their title to one ticket as against another ? It is unnecessary to examine the possible but unlikely case of an applicant obtaining two tickets bearing no syndicate names and incapable of distinction except by their numbers and taking no steps to appropriate one to his principal's account and the other to his own. But where he does adopt a name or apply marks of unknown or doubtful meaning, can he await the result and then if one ticket draws a prize claim it, unless his principals can prove the meaning of his signs ?

Yet that in substance is the present case. For it makes no difference that E.G.Steel acted as the delegate of his father, who himself was to act on behalf of the syndicate in obtaining the ticket; E.G.Steel assumed the role of fiduciary agent in applying for the ticket and his father authorized him to do so and claimed through him.

In my opinion the general rule supplies the answer and places the burden of proof upon the defendants.

This burden has been made much heavier by the conduct of E.A.V.Steel in falsely putting forward as the ticket in which the plaintiffs were interested that obtained from Mrs. Avery and in endorsing their names upon it. The fabrication

of a story and of documentary support for it is a circumstance to which great probative weight is attached, not only as a matter of policy, but as a rational ground of inference against the party guilty of an attempt by dishonest means to defeat his adversary's claim. It does not however operate to reverse the legal burden of proof upon an issue. What it does is to supply the means of supporting the burden. It raises an inference or presumption of fact of much probative force. At the same time an artificial effect should not be given to such misconduct on the part of a litigant. " Even where the positive fabrication of evidence is proved against a party, tribunals whose object is the ascertaining of the truth will consider the nature of the case

and the temptation which might have led to the fabrication." - Best on Evidence, sec.414 p.357 12th Ed. This does not mean that upon a civil issue an explanation of such misconduct consistent with a conclusion of fact in favour of the guilty party ought to be adopted simply because it is open as an hypothesis. In the present case E.A.V.Steel not only placed the plaintiffs' names on the Wedding Syndicate ticket and put it forward as their's, but he afterwards explained his conduct as a mistake, and that explanation was found to be false. All this must be considered with other circumstances of suspicion; there is the failure to produce not only the Wedding Syndicate ticket but also the Going Away ticket, which there was every reason to preserve with care

if it was in truth that of the plaintiffs' syndicate and bore no markings to the contrary. Then there are the first inconsistent statements of the defendants. The general circumstances of the case cannot be disregarded. In view of all these considerations I think it is impossible to reach an affirmative conclusion in favour of the defendants.

The finding that on Monday seventh November E.A.V. Steel did tell his son to get a Lottery ticket and call it Sodelbia appears to me quite insufficient to support the inference that the name was in the end adopted to designate the syndicate which father and son alone formed. The son did not act on the statement forthwith and nothing was done until Thursday tenth November when both

tickets were sent for. The title for neither syndicate had been finally settled. "Sodelbia" had been suggested in the meantime in the early hours of the morning as the title for the Syndicate of four for which it was an apt name, and it was just as likely that "Soldelbia" would in the event be used for that Syndicate as for the other. No doubt the incident shows that Steel's mind ran on "Soldelbia" as a syndicate title but it affords but little ground for saying to which Syndicate it was in the end applied. In my opinion the Appeal should be allowed withcosts. The decree of the Supreme Court should be discharged and a Decree made granting the relief prayed in the Plaintiffs Statement of Claim.

I am authorised by my brother Evatt to say that he has read the forgoing judgment and concurs in it.

GRIFFITHS AND OTHERS -v- STEEL AND OTHERS

JUDGMENT McTIERNAN J.

In my opinion the appeal should be dismissed. I agree with the reasons for judgment of my brother Rich.